



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 15 2013

Brian G. Svoboda, Esq.
Perkins Coie
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960

RE: MUR 6631

Dear Mr. Svoboda:

On August 28, 2012 the Federal Election Commission notified your clients, Howard Berman, Berman for Congress and Bruce Corwin, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and the information supplied by your clients, the Commission, on May 9, 2013, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 76426 (Dec. 18, 2003); Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Marne Mitskog, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Berman for Congress and MUR: 6631
 Bruce Corwin in his official
 capacity as treasurer

Howard Berman

Berman & D'Agostino

Michael Berman, Inc.

Michael Berman

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Commission by Scott Abrams.

II. FACTUAL AND LEGAL ANALYSIS

The Complaint in this matter alleges that Representative Howard Berman and his authorized committee, Berman for Congress and Bruce Corwin in his official capacity as treasurer (the "Committee"), paid his brother, Michael Berman, "almost three quarters of a million dollars for barely any, if any, services provided," or for services that "were compensated well in excess of fair market value." Compl. at 2. The Complaint alleges that such payments therefore violated the "personal use" prohibitions of the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations. See 2 U.S.C. § 439a(b); 11 C.F.R. § 113.1(g)(1)(i)(H); Compl. at 2.

Howard Berman was first elected as a Representative to Congress in 1982 and continued to serve in Congress until the 2012 election cycle, when he lost to Brad Sherman in the contest for California's newly-redistricted 30th District. Michael Berman is Howard Berman's brother

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and a well-known political consultant in California. Compl. at 2; Resp. at 1-2. The Complaint identifies Berman & D'Agostino Campaigns ("Berman & D'Agostino") and Michael Berman, Inc.¹ as entities associated with Michael Berman. Compl. at 2, n.3. The Response submitted by the Committee acknowledges that Berman & D'Agostino is a California political consulting firm associated with Michael Berman. Resp. at 1-2.

The Complaint alleges that, from the 1992 through 2010 election cycles, the Committee "did not receive, nor did it need to receive, any real services from Michael Berman." Compl. at 2. In support, the Complaint asserts that "Howard Berman faced token opposition in almost every election, conducted barely any voter persuasion efforts, and yet paid his brother \$741,500 to oversee his non-existent voter persuasion efforts." *Id.* The Complaint summarizes the Committee's opposition and margins of victory in each election since 1992 and identifies the fees paid to Berman & D'Agostino or Michael Berman, Inc. *Id.* at 4-9.² For instance, the Complaint notes that Berman ran unopposed in the primary and general elections of 2008, yet the campaign paid Berman & D'Agostino a "political campaign consulting fee" of \$80,000. Compl. at 7. The Complaint further identifies a Committee payment to Michael Berman's political consulting firm of \$90,000 in 2010 for consulting services, which the Complaint asserts also was unearned. Compl. at 1, 8; *id.*, Attach. 1, at 24. Based on these allegations, the Complaint argues that the Candidate was "enriching his brother with campaign funds under the pretense of receiving voter persuasion consulting services." *Id.* at 8.

¹ Michael Berman, Inc. is an active California corporation located at 8665 Wilshire Blvd. #208 in Beverly Hills, CA., according to the California Secretary of State. See <http://kepler.sos.ca.gov/cbs.aspx>.

² While the Complaint's allegations extend to 1992, only the 2008 and 2010 election cycles remain within the applicable 5-year limitations period. See 28 U.S.C. § 2462. There are no payments to Michael Berman, Inc. within that limitations period.

The Complaint acknowledges that "Michael Berman does have expertise in voter persuasion." *Id.* at 2. But the Complaint alleges that "to the extent Michael Berman may have provided some 'services' [for 'voter persuasion' efforts], such services were compensated well in excess of fair market value, particularly given the lack of any meaningful challenge to Howard Berman's incumbency during this time period." *Id.*

According to the Complainant, "[t]ypically those who oversee voter persuasion efforts and manage the direct mail campaign receive fees totaling roughly 10-15% of the amount spent on direct voter persuasion efforts," such as "printing, postage, and advertising." *Id.* at 9. The Complaint alleges that the Committee's payments to Michael Berman, Inc. and Berman & D'Agostino from 1992 to 2010, totaling \$741,500, exceed "150% of the maximum that might have been spent on voter persuasion." Compl. at 2 & n.3, 9 (contrasting Committee's spending with amounts Sherman for Congress Committee allegedly paid for voter persuasion services). The Complaint also points to the timing of the Committee's payments. *Id.* at 10. In 2008, for example, no candidate had filed to oppose Howard Berman by the March 2008 deadline, yet the Committee paid Michael Berman \$80,000 in October 2008. *Id.*

In short, because the Committee's payments to a firm associated with the candidate's brother exceed what the Complaint asserts is fair market value for consultation services characterized solely as "voter persuasion" services, the Complaint concludes that the consultation payments constitute prohibited "personal use" violations under 11 C.F.R. § 113.1(g)(1)(i)(H). *Id.* at 2.

Neither Michael Berman, Berman & D'Agostino, nor Michael Berman, Inc., responded to the Complaint. Howard Berman and the Committee filed a Response, denying the claim that the Committee overpaid the firm. The Response argues that the Complaint's assessment of the

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value of the services Michael Berman provided the Committee is faulty, as it fails to account for the full value the Committee received as a result of those services:

the Complaint overlooks the facts that Representative Berman's success, both in deterring and defeating his opponents, [was] owed in no small part to the strategic advice he received; that Berman & D'Agostino did not simply provide voter contact services, but general strategic consulting advice on a wide range of political matters, including redistricting, which was a major concern in California in 2008 and 2010; and that Berman & D'Agostino was unquestionably well qualified to provide these services, which Respondents were not otherwise receiving from others.

Resp. at 2. The Respondents also assert that "[t]here is no legitimate question that Berman & D'Agostino fully performed the services described, and that Respondents received full value for what they paid."³ *Id.*

In support of its assertion that Berman & D'Agostino earned the substantial payments it received, the Response cites two news reports. According to a newspaper account from 1992, "Berman & D'Agostino is 'a high-power political consulting firm' in California." Resp. at 2 (quoting Alan C. Miller, *Mr. Inside & Mr. Outside*, L.A. TIMES, Mar. 29, 1992, at 18 [hereinafter Miller, *Mr. Inside*], available at http://articles.latimes.com/1992-03-29/magazine/tn-360_1_howard-berman (characterizing Michael Berman as "brilliant" and the Berman brothers as "Southern California's most potent collective political force")). The second cited article, published in 2005, further notes Michael Berman's skill as a political campaign consultant and gives examples of the range of fees paid to political consultants. Lisa Friedman, *Local Congressmen Paid Kin; Politicians Defend Hiring Family Members*, L.A. DAILY NEWS, Apr. 14, 2005 [hereinafter Friedman, *Local Congressmen*], available at

³ The Response provides no documentation in support of its representations, such as consulting contracts, invoices, or affidavits based on personal knowledge.

<http://tinyurl.com/a5a43de> (quoting American Enterprise Institute resident scholar Norman Ornstein that “Mike Berman is, by consensus, the top political consultant out there.”).

The Response also contends that Berman & D’Agostino has “represented a wide range of candidates and initiatives, as well as the interests of Democratic legislators in the redistricting process over the past three decades” and “served as Representative Berman’s de facto campaign manager and strategic advisor in the 2010 and 2008 cycles, and in previous cycles.” Resp. at 2; see also Hillel Aron, *Howard Berman’s Last Stand*, L.A. WEEKLY (May 31, 2012) [hereinafter Aron, *Last Stand*], available at <http://www.laweekly.com/2012-05-31/news/howard-berman-brad-sherman-june-5-2012/> (noting that one of Michael Berman’s specialties is “redistricting,” and in 2001, “30 of 32 Democratic congressional members paid [Michael Berman] \$20,000 to draw each of them a safe seat, as did the Democrats in the state Senate — a mega payday of more than \$1.1 million.”).

Disclosure reports filed by the Committee reflect two payments to Berman & D’Agostino within the five-year statute of limitations period — an \$80,000 payment in 2008 and a \$90,000 payment in 2010 — which both the Complaint and the Response reference, along with a payment of \$50,000 made to Berman & D’Agostino on June 25, 2012.⁴ The Complaint does not explain its omission of the June 25, 2012, disbursement from its list of alleged personal use violations, although we note that Brad Sherman defeated Howard Berman during that election cycle.⁵

Contributions accepted by a candidate may be used by the candidate “for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate” or

⁴ See Berman for Congress, 2008 Pre-General Report at 11; Berman for Congress, 2010 Amended Post-General Report at 17; Berman for Congress, 2012 Amended July Quarterly Report at 98.

⁵ The Complainant, Scott Abrams, identifies himself as the campaign manager for Sherman for Congress. Compl. at 1. He filed the Complaint August 23, 2012, during the election contest between Berman and Sherman for the 30th District Congressional seat.

"for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." 2 U.S.C. §§ 439a(a)(1)-(2). The Act provides, however, that contributions to a candidate "shall not be converted to any personal use." 2 U.S.C. § 439a(b)(1).

The Commission regulations state:

(g) *Personal use.* *Personal use* means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1)(i) Personal use includes but is not limited to the use of funds in a campaign account for any item listed in paragraphs (g)(1)(i)(A) through (J) of this section:

(A) Household food items or supplies.

(B) Funeral, cremation or burial expenses except those incurred for a candidate (as defined in 11 CFR 100.3) or an employee or volunteer of an authorized committee whose death arises out of, or in the course of, campaign activity.

(C) Clothing, other than items of *de minimis* value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans.

(D) Tuition payments, other than those associated with training campaign staff.

(E) Mortgage, rent or utility payments—

(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage.

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity.

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(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises.

(H) Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

(I) Salary payments by a candidate's principal campaign to a candidate in excess of the lesser of: the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks; or the earned income that the candidate received during the year prior to becoming a candidate. Any earned income that a candidate receives from salaries or wages from any other source shall count against the foregoing limit of the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks. The candidate must provide income tax records from the relevant years and other evidence of earned income upon the request of the Commission. Salary shall not be paid to a candidate before the filing deadline for access to the primary election ballot for the Federal office that the candidate seeks, as determined by State law, or in those states that do not conduct primaries, on January 1 of each even-numbered year. See 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, his or her principal campaign committee may pay him or her a salary from campaign funds through the date of the general election, up to and including the date of any general election runoff. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a candidate, no salary payments may be paid beyond the date he or she is no longer a candidate. In odd-numbered years in which a special election for a Federal office occurs, the principal campaign committee of a candidate for that office may pay him or her a salary from campaign funds starting on the date the special election is set and ending on the day of the special election. See 11 CFR 100.24(a)(1)(ii). During the time period in which a principal campaign committee may pay a salary to a candidate under this paragraph, such payment must be computed on a pro-rata basis. A Federal officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary payments as a candidate from campaign funds.

(J) A vacation.

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The Complaint rests heavily on the premise that Berman & D'Agostino limited its consultation services to "voter persuasion" efforts, and that the payments received were "well in excess of fair market value for these services." *See* Compl. at 2, *passim*. But the Complaint cites no basis for its conclusion that the services were so limited. The Response in turn represents that the firm provided "general strategic consulting advice on a wide range of political matters, including redistricting." Resp. at 2.⁶ Further, as acknowledged in the Complaint, Michael Berman is a well-known and highly regarded California political consultant. Michael Berman worked in close collaboration with Howard Berman throughout his lengthy time in office, Michael Berman was a political consultant before his brother became a candidate and Berman & D'Agostino received substantial payments for consultation services from many other candidates. *See generally* Aron, *Last Stand*, *supra*; Friedman, *Local Congressmen*, *supra*; Miller, *Mr. Inside*, *supra*.

The Complaint notes that Howard Berman faced little or no meaningful opposition during many of the election cycles in which the Committee paid Berman & D'Agostino for consulting, arguing that this demonstrates that the substantial payments to the firm were unwarranted. But this fact, even if true, does not suggest either that the Committee received no *bona fide* consulting services or that it overpaid for such services. "[C]andidates have wide discretion over the use of campaign funds." *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) (Explanation & Justification) ("Personal Use E&J"). If a "candidate can reasonably show that the expenses . . . resulted from campaign or officeholder activities, the Commission will not consider the use to be personal

⁶ The relevant disclosure reports also describe these services more broadly than the Complaint does. In 2008, the Committee describes the purpose of the disbursement to Berman & D'Agostino as a "political campaign consulting fee." Similarly, in 2010 and 2012, the Committee described the purpose of the disbursements as "political campaign consulting services" on its disclosure reports.

use." *Id.* As the Response notes, a committee may reasonably pay for services that deter potential opponents. Resp. at 2. In this case, moreover, the Response asserts that the Committee benefited from Berman & D'Agostino's expertise on California legislative restricting. *Id.*; see Aron, *Last Stand* (reporting that in 2008 and 2010 Representative Berman and his brother fought changes to the redistricting process).

Under these circumstances, the Commission, under *Heckler v. Chaney*, 470 U.S. 821 (1985), dismissed the allegation that Howard Berman, the Committee, Michael Berman, and Berman & D'Agostino violated 2 U.S.C. § 439a(b) and 11 C.F.R. § 113.1(g)(1)(i)(H) by engaging in a prohibited personal use of campaign funds. As already noted, there are no payments to Michael Berman, Inc. within the statute of limitations period, so the Commission dismissed the allegation that Michael Berman, Inc. violated 2 U.S.C. § 439a(b) and 11 C.F.R. § 113.1(g)(1)(i)(H).

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